Statutory Review of the Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021

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About Women's Legal Service NSW

Women's Legal Service NSW ('WLS NSW') advocates for an end to gender-based violence and for gender equity in Australia. As a state-wide specialist women's legal service, we assist women and non-binary people across NSW by providing legal advice and representation from our trauma informed, holistic legal practice across a range of practice areas including family law, domestic/family and sexual violence, compensation and victims support for victims of crime, discrimination, employment and sexual harassment. We prioritise women and non-binary people who are experiencing deep and persistent disadvantage.

Our specialist programs include:

- First Nations Women's Legal Program, led by First Nations staff and supported by a First Nations Women's Consultation Network
- Women's Rights, and
- Working Women's Centre.

All three programs focus on responding to legal issues faced by women with a particular focus on responding to gender-based violence and addressing women's safety, economic security and intersecting discrimination.

We use our experience gained from working with over one hundred thousand women and our feminist analysis of social issues and the law to determine where we can make the most impactful and positive change. We advocate for systemic change through policy and law reform, strategic litigation and providing education and training to the legal profession, the community services sector, and other key stakeholders.

Sexual violence

Women's Legal Service NSW specialises in working with victim-survivors of gendered violence. Our work in the area of sexual violence includes advising women subjected to sexual violence about reporting to police, evidence collection and legal processes; victims support, personal injury civil claims and National Redress Scheme entitlements; privacy and use of sensitive information; complaints about service providers such as police; representing complainants in removing suppression orders or non-publication orders; representing women as respondents to defamation proceedings commenced against them by perpetrators as a weaponisation of the legal system in response to reporting sexual violence; and accessing support in their recovery from sexual violence.

We also provide legal services to other services providing therapeutic support to women. This includes advising and at times representing these services to respond to subpoenas and requests for records in court proceedings.

A significant part of the work of the Working Women's Centre is responding to sexual violence, including sexual harassment in the workplace.

For over 15 years, we have provided legal services to women in prison. Our advice and representation services to this client cohort are reflective of the high rates of gender-based violence experienced by women prior to entering prison, as well as sexual violence perpetrated within prison.

Acknowledgments

We acknowledge the Traditional Custodians of the lands on which we work across NSW and on which we live. We pay deep respects to Elders past and present. Is, was and always will be Aboriginal land.

We acknowledge the many women who have been subjected to gender-based violence with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

Contributors

The following people contributed to the research and/or drafting of this submission:

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Use of language

Victim-survivor

We acknowledge that there are different preferences for the language used to describe a person who has been subjected to gender-based violence. Some prefer the terminology 'victim', some 'survivor' some 'victim-survivor'. Some people describe the experience as 'living through' gender-based violence. In this submission we use the term 'victim-survivor'. This is intended to be inclusive of all.

Gendered language

The research and our experience over forty years clearly highlights that gender-based violence is predominantly perpetrated by men against women and children. Our language in this submission is gendered to reflect this. This is not intended to negate the fact that gender-based violence can be perpetrated against any person across the gender binary.

Criminal legal system

Many First Nations people have questioned the accuracy of the description of the 'criminal justice system' in Australia as a 'just' system, noting its continuing colonising impacts.

Many victim-survivors of gender-based violence who engage in the criminal legal system also challenge the description, advocating that systems must become more gender-based violence and trauma-informed, and the importance of cultural safety and disability informed and LGBTIQ+ informed practices.

In acknowledging that language matters and the importance of using language that resonates particularly with First Nations people and victim-survivors we use the language 'criminal legal system'.

Opening comments

We thank the Department of Communities and Justice for the opportunity to provide comments in advance of the statutory review of the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021*.

The 2021 reforms represented a major step towards addressing the justice gap faced by victim-survivors of sexual violence. We consider that the policy objectives of the provisions remain valid and do not require re-examination. However, sexual assault trials have been observed to be a uniquely 'reform-resistant' legal sphere,[1] where legislative reform of itself can have little impact upon long-embedded practices. Thorough and regular reviews of the operation of the reforms is therefore vital to ensure that the objectives are met.[2]

The Discussion Paper asks for comments on whether the reviewable provisions require amendment. To answer this, it is crucial for us to understand how these provisions are currently being implemented in practice. This is difficult to assess in advance of the results of the trial transcript analysis being available. We look forward to providing further comments at the point that this study is complete and made publicly available.

Another crucial source of information to understand how the reforms are being implemented will be the police report analysis recommended by the Australian Law Reform Commission (*ALRC*). The ALRC set out that, within 12 months of their January 2025 report, states should each establish an independent taskforce to review reports of sexual violence made to police that did not progress to charge and publish a report of its findings.[3] We look forward to updates on the implementation of this recommendation in NSW, which will provide invaluable information about how the reforms are operating.

Without transcript or police report data, nor evidence of any early shifts in charging and conviction rates, it is difficult to assess what impact the reforms have had on the criminal legal process to date. However, a significant body of research has been produced since the enactment of the reforms that has shed light on the measures that are required for sexual assault reforms to achieve meaningful change. Most notably, this includes: comprehensive analyses of pre-reform NSW trial transcripts,[4] several major analyses of trials in comparable jurisdictions,[5] and the ALRC's *Safe, Informed, Supported* report.[6] Noting that the NSW Law Reform Commission (*NSWLRC*) prescribed that statutory reviews should be informed by research,[7] our submission has been heavily informed by the findings of these sources. We also draw upon the experiences of our clients, who continue to report the use of questions derived from outdated understandings of consent and other rape myths.

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[1] Elisabeth McDonald et al, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with Those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 1–15.

[2] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report 148, September 2020) [10.5].

[3] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (ALRC Report 143, January 2025) Recommendation 4.

[4] Julia Quilter and Luke McNamara, *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis* (Crime and Justice Bulletin No. 259, NSW Bureau of Crime Statistics and Research, 2023); Sarah Croskery-Hewitt, 'Intoxication Evidence and the Rewriting of Sexual Assault: A Study of New South Wales Trials' (PhD Thesis, University of Wollongong, 2025).

[5] See, eg: Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission, August 2021); Elisabeth McDonald, *In the Absence of the Jury: Examining Judge-Alone Rape Trials* (Canterbury University Press, 2022); Elisabeth McDonald, *Prosecuting Intimate Partner Rape: The Impact of Misconceptions on Complainant Experience and Trial Process* (Canterbury University Press, 2023).

[6] Australian Law Reform Commission (n 3).

[7] New South Wales Law Reform Commission (n 2) [10.14].

RECOMMENDATIONS

Impacts of the reforms on First Nations complainants

We recommend that the review:

1. Examines all post-reform trials involving First Nations complainants and reports specifically on the treatment of these complainants.
2. Assesses the application of specific reforms in trials involving First Nations complainants, including whether:
    - the communicative consent standard is being effectively applied in trials involving First Nations complainants;
    - First Nations complainants are being subjected to irrelevant and/or disparaging questioning about their alcohol and drug use;
    - intoxication evidence is assisting in proving First Nations complainants' non-consent, rather than continuing to be misused to infer that First Nations complainants *did* consent; and
    - histories of violence towards First Nations complainants are being readily admitted and relied upon in assessing their non-consent.

Assessing the efficacy of the provisions

We recommend that the review:

3. Focuses upon enhancing the efficacy of the reviewable provisions *in practice* within the courtroom.
4. Addresses each matter prescribed by the NSWLRC.
5. Analyses the following key features of trial practice:
    - how consent is being conceptualised by prosecutors, defence counsel, and judges;
    - the respective level of scrutiny being placed on complainants' 'failure' to demonstrate non-consent, versus accused persons' efforts to ascertain consent;
    - how prosecutors and judges are responding to any defence persistence in engaging outdated concepts of consent;
    - whether complainant intoxication is being used to prove non-consent, or whether it continues to primarily be used to attack complainants' credibility and reliability;
    - whether, in trials involving intimate partner sexual violence, histories of domestic abuse are readily being admitted and relied upon to prove non-consent;
    - whether the available jury directions are being consistently (and promptly) used each time a relevant misconception is engaged by counsel;
    - whether the giving of jury directions is leading counsel to desist in misconception-based lines of reasoning; and
    - whether the provisions have encouraged scrutiny of the relevance and admissibility of evidence that is raised to support misconception-based reasoning.
6. Includes all post-reform trials involving complainant intoxication and all post-reform trials involving intimate partner sexual violence.
7. Assesses how visible and operative the communicative consent standard has been in practice.

Other crucial sources of data

We recommend that:

8. To assess police implementation of the reforms, the ALRC-recommended independent review of police sexual assault reports is urgently progressed. The Taskforce that conducts the review should then establish an ongoing independent review mechanism for police reports that do not progress.
9. To monitor the ongoing implementation of the reforms, annual data is publicly reported on sexual violence cases that are discontinued by ODPP, including the reasons for discontinuance.
10. To monitor implementation of the reforms and provide data for future reviews, the ALRC-recommended independent feedback mechanism is established. This is to be managed by the incoming independent Victims of Crime Commissioner and must be adequately funded.
11. The review process incorporates meaningful consultation with victim-survivors who have engaged with the criminal process post-reform.

The requirement to report on the efficacy of training (s 583(6)(c))

We recommend that:

12. The review provides a thorough evaluation of whether and how training has impacted trial practice.
13. The review provides an independent evaluation of how training has impacted police practice.
14. During the next review period, ODPP training focuses on practical strategies and resources for embedding the communicative model of consent and the resistance of rape-myths into trial practice. The training and resources should be developed with the input of experts and tailored to the specific tasks required of prosecutors.
15. During the next review period, judicial training focuses on practical strategies and resources for embedding the communicative model of consent and the resistance of rape-myths into trial practice. The training and resources should be developed with the input of experts and tailored to the specific tasks required of judges.

Improving the efficacy of the provisions

We recommend that:

16. To drive accountability for the implementation of the reforms, the NSW Government urgently actions the ALRC's recommendation to fund Women's Legal Services and other trusted organisations to provide independent legal advice and targeted representation to all victim-survivors.
17. Robust ground rules hearings are mandated for all sexual offence trials, to aid in the prevention of myth-based lines of questioning and the identification of appropriate jury directions.
18. Complainants are entitled to have independent representation at ground rules hearings and during cross-examination, for the purpose of ensuring that directions made at ground rules hearings are upheld.

Further proposed reforms

19. We support the introduction of a direction to address post-event contact between the complainant and accused. We recommend that this direction explicitly addresses key misconceptions concerning intimate partner sexual violence.
20. We support a direction being introduced to address 'flirtatious' behaviour by the complainant.
21. We recommend that sexual experience evidence restrictions are clarified so as to explicitly capture 'flirtation' evidence.
22. We support:
    - A direction being introduced that sex workers can be sexually assaulted.
    - 'Stealthing' being addressed in a standalone provision.
    - 'Warning' being replaced with 'direction' in relevant provisions of the *Criminal Procedure Act*.

Sexual experience evidence

We recommend that:

23. The transcript study addresses the interaction between section 294CB of the *Criminal Procedure Act 1986* and section 61HJ(1)(a) of the *Crimes Act 1900*.
24. The bar on the admission of evidence of the complainant's sexual experience is retained.
25. Section 294CB is amended to specifically restrict evidence being adduced, or questions being asked in cross-examination, by or on behalf of the accused.
26. Complainants are given standing to appear, and access to independent legal representation, if evidence is sought to be adduced concerning their sexual experience.

Inconsistencies with the Crimes (Administration of Sentences) Act *require attention*

27. We recommend that the penalty for offences under s 236Q of the *Crimes (Administration of Sentences) Act 1999* is significantly increased, to align with current understandings of consent.

SCOPE OF THE REVIEW

1. The upcoming statutory review is required to assess whether '*the terms of the reviewable provisions remain appropriate for securing the objectives.*' To evaluate whether the provisions are appropriate for meeting the objective that '*sexual offences are prosecuted fairly and effectively*', it is vital that the review focuses on how the provisions are being implemented in practice. We stress that any further legislative reforms must be informed by a sound understanding of how the provisions are currently operating.
2. In recognition of the importance of monitoring implementation, the legislation requires that the review must consider trial transcripts. This transcript review will provide the clearest insight into whether the provisions have been effective in securing the objectives. Given that, as at March 2025, 78 post-reform sexual assault matters had proceeded to trial, there will be a large enough data set to identify clear trends in the application of the provisions.
3. In this section, we make recommendations as to the matters that this trial transcript review must address. We also identify further data sources that must be considered in order to understand the impacts of the provisions in practice, including police files and victim-survivor feedback.
4. We look forward to sharing our views on how courtroom implementation of the provisions might best be improved once the trial transcript review is available.

Impacts of the reforms on First Nations complainants

5. It is essential for this review to consider the impacts of the reforms upon First Nations women, who make up a disproportionate number of sexual assault complainants and face particularly egregious treatment throughout the criminal process. The consent provisions under review – which address communicative consent, intimate partner sexual violence, and complainant intoxication – each have specific and heightened relevance for First Nations women.
6. First Nations women are severely affected by inadequate legal responses to sexual assault. They experience 'unusually high levels of sexual violence in comparison to their non-Indigenous counterparts',[8] and institutional racism and mistrust of the legal system act as powerful barriers to their reporting of sexual assaults to police.[9] Despite strong disincentives to reporting, First Nations women are significantly overrepresented as sexual assault complainants.[10]
7. Very few studies in NSW have had access to sexual assault trial transcripts to date.[11] The only study with a large enough data set to specifically analyse the treatment of First Nations victim-survivors was the *Heroines of Fortitude* study, which observed stark inequities. The study found that Aboriginal women were ten times more likely to be complainants in the trials they examined

[8] Indigenous Law Centre, *Sexual Violence and Indigenous Victims: Women, Children and the Criminal Justice System. Research Brief No 1* (University of New South Wales, 2010).

[9] A study by the Queensland Aboriginal and Torres Strait Islander Women's Task Force on Violence estimated that 88% of rape cases within Indigenous communities go unreported: Robertson, Boni, *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, 2000). See also Willis, Matthew, 'Non-disclosure of violence in Australian Indigenous communities', 2011 *Trends & Issues in Crime and Criminal Justice* no. 405 (Canberra: Australian Institute of Criminology).

[10] ABS data records that 9% of victims of reported sexual assaults in NSW in 2022 identified as Aboriginal or Torres Strait Islander, while only 3% of the NSW population identify as Aboriginal or Torres Strait Islander. See: https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/2022

[11] During the past 30 years, the only studies with access to a reasonable data set of trials have been the 1996 *Heroines of Fortitude* study and the 2023 BOCSAR-commissioned report *Experience of Complainants of Adult Sexual Offences in the District Court of NSW*.

than non-Aboriginal women,[12] and that these women faced 'compounded discrimination and bias' and 'were regularly bullied, harassed and intimidated during cross-examination'.[13]

8. The study observed that rape myths and racist tropes were routinely used to attack the credit of Aboriginal women.[14] In the context of the reforms now under review, an important finding was that:

> *Aboriginal women were asked many more questions about general drinking and drug use habits … [and] were asked a higher number of questions about drinking on the day of the offence than women in our general study population. … [T]he credibility of many Aboriginal women was frequently attacked with the use of racist myths and stereotypes about Aboriginal culture. These myths focused on Aboriginal women drinking on the day of the offence and myths about Aboriginal people being habitual drinkers.*[15]

9. More recently, Kyllie Cripps has analysed the way in which these myths were mobilised in response to the brutal sexual assault and resulting death of NSW woman Lynette Daley, in whose case the Office of the Director of Public Prosecutions (ODPP) initially declined to proceed with a prosecution.[16]

10. The only major transcript review since the *Heroines of Fortitude* study did not comment specifically on the treatment of First Nations complainants. However, it found that there was 'no foundation for concluding that sexual offence trials have been meaningfully transformed' since the time of the *Heroines of Fortitude* study.[17]

11. The current statutory review, and associated transcript study, are a vital opportunity to address the concerning lack of data on how the legal system is responding to First Nations victim-survivors. We note that the NSWLRC called for a transcript study of a similar scale to *Heroines of Fortitude*.[18] If this will not be achieved in time for the present statutory review, we urge that the transcript study for the review must at least include all post-reform trials that involved First Nations complainants and report specifically upon the treatment of these complainants.

Recommendation 1

That the review includes all post-reform trials involving First Nations complainants and reports specifically on the treatment of these complainants.

12. In terms of the specific provisions under review, there are several impacts on First Nations women that require consideration. First, in relation to the **communicative consent** standard, the extent to which this standard was visible and operative in trials involving First Nations complainants must be assessed. Previous analyses have illustrated the way that actors within the criminal system have 'lowered the standards applied when assuming consent is given by

[12] Department for Women (NSW), *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (November 1996) 97.

[13] Ibid 93 and 105.

[14] For example, heightened questioning about whether they were lying or making the accusation to obtain victims compensation.

[15] Department for Women (NSW) (n 12) 99 and 108.

[16] Cripps, Kyllie, 'Media constructions of Indigenous women in sexual assault cases: reflections from Australia and Canada' (2021) 33(3) *Current Issues in Criminal Justice* 300.

[17] Quilter and McNamara (n 4) 34.

[18] New South Wales Law Reform Commission (n 2) [10.36]-[10.41].

Aboriginal women in sexual encounters.'[19] In other jurisdictions where 'affirmative consent' models have been implemented for some time, it has been observed that 'legal standards of affirmative and explicit consent can be weakened or even disregarded' in trials involving First Nations women.[20] It is therefore crucial to monitor whether the NSW communicative consent standard is being effectively applied in trials involving First Nations women.

13. Second, in relation to the strengthened **intoxication provisions**, the review must assess whether these provisions have ensured that intoxication has assisted in proving *non*-consent, rather than continuing to be misused to infer that First Nations complainants *did* consent. The application of both the reformulated provision on when intoxication will preclude consent,[21] and the new jury direction that consent should not be assumed from a person's alcohol or drug use,[22] should be assessed. This analysis should address whether the reforms have curtailed irrelevant and disparaging questioning about First Nations women's alcohol and drug use histories, and re-centred focus on whether intoxication precluded consent.

14. Third, the application of the new provisions on non-consent where there is a **pattern of coercion, intimidation, or fear of serious harm** must be assessed. First Nations women experience extreme levels of intimate partner violence and are 31 times more likely to be hospitalized as a result of a domestic violence assault than non-Indigenous women.[23] Circumstances of perpetual fear and coercion fundamentally undermine women's ability to exercise meaningful consent. However, the criminal system has consistently struggled to respond to gendered violence in a manner that recognises its pattern-based (rather than incident-based) nature.[24]

15. The new non-consent provisions, and the subsequent coercive control reforms, signaled a much-needed willingness to respond to the pattern-based nature of intimate partner violence in NSW. However, early indications from the coercive control reforms are that they have had limited uptake in practice. In the sexual assault context, it is crucial to monitor how this pattern-based understanding is being employed in trial practice. In particular, we urge that the review should assess whether histories of violence and coercion towards First Nations complainants are being readily admitted and relied upon in assessing their non-consent.

16. We also note that the development of a dedicated NSW Aboriginal Domestic, Family and Sexual Violence Plan is a key focus area under the *NSW Strategy for the Prevention of Domestic, Family and Sexual Violence*.[25] For this plan to identify effective strategies for change, it must be informed by evidence on the current criminal response to violence against First Nations women. Research on this topic in NSW is long overdue.

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[19] Behrendt, Larissa, 'Consent in a (Neo)Colonial Society: Aboriginal Women as Sexual and Legal 'Other'' (2000) 15(33) *Australian Feminist Studies* 353 at 363. See also, eg, Cripps and colleagues' discussion of the attribution of consent to a 10-year-old Aboriginal girl who was gang raped in a heavily publicised Queensland case: Cripps, Kyllie, Megan Davis, and Caroline Taylor 'Sexual Violence in Aurukun: The Queen v BP, DK, MY, PA, Koowarta, Wikmunea, Woolla 2007' *Indigenous Law Bulletin* 7.9 (2008) 14.

[20] Lise Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41 *Akron Law Review* 865, 885.

[21] *Crimes Act 1900* s 61HJ(1)(c).

[22] *Criminal Procedure Act 1986* s 292E(b).

[23] Australian Institute of Health and Welfare, 'Aboriginal and Torres Strait Islander Health Performance Framework. Data tables: Measure 2.10 Community Safety' (Canberra, 2023), <https://www.indigenoushpf.gov.au/measures/2-10-community-safety>

[24] Notably, a recent study of 15 intimate partner rape trials in New Zealand found that 'the impact of a pattern of coercive control was not effectively presented to the jury' and that there was a need for 'prosecutors [to] make more effective use of evidence of a context of psychological abuse when developing arguments for the lack of freely given consent.' McDonald, *Prosecuting Intimate Partner Rape: The Impact of Misconceptions on Complainant Experience and Trial Process* (n 5) 456.

[25] *Pathways to Prevention: NSW Strategy for the Prevention of Domestic, Family and Sexual Violence 2024-2028* (Department of Communities and Justice, September 2024) 24.

Recommendation 2

That the review assesses the application of specific reforms in trials involving First Nations complainants, including:

- whether the communicative consent standard is being effectively applied in trials involving First Nations complainants;
- whether First Nations complainants are subjected to irrelevant and/or disparaging questioning about their alcohol and drug use;
- whether intoxication evidence has assisted in proving First Nations complainants' *non*-consent, rather than continuing to be misused to infer that First Nations complainants *did* consent; and
- whether histories of violence towards First Nations complainants are being readily admitted and relied upon in assessing their non-consent.

Assessing the efficacy of the provisions

17. In recommending reform to the law of consent, the NSWLRC recognised that '*sexual offence law reform may be particularly susceptible to implementation problems*'. The NSWLRC therefore recommended thorough and regular reviews to assess '*what impact the changes are having on criminal justice outcomes*' and set out minimum requirements for these reviews.[26]

18. The NSWLRC made clear that the intention of the reviews was to assess the efficacy of the reforms in practice. They recommended that statutory reviews should consider whether the reforms have:

    i. *influenced the frequency with which arguments based on misconceptions about consensual and non-consensual sexual activity are used in sexual offence trials;*

    ii. *reduced the over-emphasis in trials on whether the complainant resisted or otherwise demonstrated a lack of consent;*

    iii. *enabled the law better to respond to situations in which a complainant "freezes" and does not say or do anything to communicate consent;*

    iv. *improved the way the law treats sexual activity involving intoxicated complainants;*

    v. *improved the way the law responds to non-consensual sexual activity occurring in the context of domestic and family violence; and*

    vi. *led to a greater emphasis on whether the accused person took steps to ascertain consent and, if so, whether those steps were adequate*.[27]

We urge that each of these minimum requirements is addressed.

Recommendation 3

That the review focuses primarily upon enhancing the efficacy of the reviewable provisions *in practice* within the courtroom.

[26] New South Wales Law Reform Commission (n 2) Chapter 10.

[27] Ibid [10.14]-[10.18].

Recommendation 4

That the review addresses each matter prescribed by the NSWLRC.

19. For the review to be able to answer the questions posed by the NSWLRC, we recommend that the transcript analysis must specifically assess:
    i. how consent is being conceptualised by prosecutors, defence counsel, and judges;
    ii. the respective level of scrutiny being placed on complainants' 'failure' to demonstrate non-consent, versus accused persons' efforts to ascertain consent;
    iii. how prosecutors and judges are responding to any defence persistence in engaging outdated concepts of consent;
    iv. whether complainant intoxication is being used to prove non-consent, or whether it continues to primarily be used to attack complainants' credibility and reliability;
    v. whether, in trials involving intimate partner sexual violence, histories of domestic abuse are readily being admitted and relied upon to prove non-consent;
    vi. whether the available jury directions are being consistently (and promptly) used each time a relevant misconception is engaged by counsel;
    vii. whether the giving of jury directions is leading counsel to desist in misconception-based lines of reasoning; and
    viii. whether the provisions have encouraged scrutiny of the relevance and admissibility of evidence that is raised to support misconception-based reasoning.

Recommendation 5

That the review analyses the above-listed specific features of trial practice.

20. To address the impacts of provisions concerning **non-consent in specific circumstances**, an adequate sample of relevant trials must be analysed. We recommend that all post-reform trials involving complainant intoxication and all trials involving intimate partner sexual violence are included in the transcript study.

Recommendation 6

That the review includes all post-reform trials involving complainant intoxication and all post-reform trials involving intimate partner sexual violence.

21. In relation to the **'communicative' consent standard**, we note that an analysis of 30 pre-reform trials involving intoxication found that the question of whether acquiescence constitutes consent was in fact rarely raised.[28] That is; the defence case was typically that the complainant was an active participant in sexual activity who had unequivocally communicated her consent. Defence counsel then claimed that complainants had either 'forgotten consenting' due to their intoxication or had fabricated their account of sexual assault for an ulterior motive.

[28] Croskery-Hewitt (n 4) 264–5.

22. This could suggest that the impacts of the communicative consent standard might be more limited than hoped, at least in trials involving complainant intoxication. It is therefore important for the transcript analysis to assess how visible and operative the communicative consent standard has been in practice. If disputes as to what can reasonably be read as consent are rarely a central issue, different aspects of trial practice may need to be targeted to achieve the reform objectives.

Recommendation 7

That the review assesses how visible and operative the communicative consent standard has been in practice.

Other crucial sources of data

23. The NSWLRC made clear that the review should capture the impacts of the reforms throughout the criminal process.[29] Of course, trial transcripts only reflect one part of the criminal process. The vast majority (85%) of sexual assault reports do not progress to a trial.[30] In most cases, police decline to lay charges or the ODPP declines to prosecute. The impact of the provisions during the earlier stages of the criminal process is therefore of great importance.
24. We have worked with many clients who have made complaints of post-reform sexual assault to police, but few have ultimately progressed through the criminal trial process. We have not noted any marked shift in the police questioning practices that clients report, nor the types of complaints that proceed to charge. To understand whether and how the reforms are impacting police practice, an independent review of post-reform police reports is necessary.
25. We note that a review of police reports is already due to be undertaken, at the recommendation of the ALRC. The January 2025 *Safe, Informed, Supported* report recommended that:

> *State and territory governments should each establish and fund an independent taskforce within 12 months of this Report to undertake an initial review of all reports of sexual violence made to police within the prior 12 to 18 months that did not progress to charge and publish a report of its findings and recommendations[.]*[31]

We urge that this review must be promptly progressed so that its findings can inform the present statutory review.

26. Qualitative analyses of police files have recently been undertaken in other jurisdictions and have highlighted important avenues for training and practice improvements.[32] We note that there is a statutory obligation to table a report on the training that has been provided to agencies (including police) on communicative consent, and the effectiveness of this training.[33] The report

[29] For example, the NSWLRC instructed that reviews should assess: what impact the provisions are having on criminal process outcomes; what complainants' experiences of the post-reform criminal process have been; and what the sexual violence sector's experiences of the post-reform criminal process have been.

[30] An analysis of reported sexual assaults in 2018 found that less than 15% of recorded adult sexual assaults proceeded to court and, of those, only 38% resulted in a conviction: Brigitte Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System* (NSW Bureau of Crime Statistics and Research Bureau Brief No 170, rev Jan 2025).

[31] Australian Law Reform Commission (n 3) Recommendation 4.

[32] Rachael Burgin and Jacqui Tassone, *Beyond Reasonable Doubt? Understanding Police Attrition of Reported Sexual Offences in the ACT* (Swinburne University of Technology, 2024).

[33] *Crimes Act 1900* (n 21) s 583(6)(c).

tabled in December 2024 did not report on the effectiveness of training.[34] A review of police reports is necessary to establish whether training has been successful in ensuring that police apply the communicative consent standard in their questioning and investigative practices.

27. Because there is currently extremely limited scope for victim-survivors to have legal support through the criminal process, much of what our service knows about the implementation of the reforms is anecdotal. Post-reform, clients continue to report that police questioning practices do not reflect a communicative consent standard. Clients have described police questioning that remains focused on rape-myth based expectations such as force, resistance, injury, and immediate complaint, rather than querying whether and how the perpetrator sought consent. We also observe significant variability in police understandings of sexual violence across different area commands, with regional and remote areas being particularly challenging.

28. To illustrate the types of challenges our clients continue to face in reporting sexual assault, we are including an anonymised example of a client's recent experience with police.

CASE STUDY: MYRIAM

Myriam* was sexually assaulted in 2024 and reported the sexual assault to police.

In her interview with police, Myriam felt frustrated at being questioned extensively on her 'failure' to avert the sexual assault. Myriam had described a typical 'freeze' response to being sexually assaulted. However, she was questioned about matters including whether she resisted with a verbal 'no', tried to push the perpetrator off her, tried to run away, or screamed for help. She was not asked anything about whether the perpetrator made any efforts to ascertain her consent. She was highly distressed at being made to feel at fault for the sexual assault.

From this initial interview, the officer in charge (*OIC*) drafted Myriam's statement and she was asked to sign it. She did not feel that the statement drafted by the OIC adequately captured the experience from her perspective. Myriam wanted to write her own statement but was told that this was not permitted. She later returned and was assisted by the officer to make a second supplementary statement, but still was not happy with the way it was drafted.

Over time, Myriam became increasingly frustrated by the lack of action and understanding of the OIC. The OIC repeatedly told her to think carefully about whether she wanted to proceed with her complaint, making her feel pressured to drop the matter. She did not feel the OIC was investigating thoroughly or trying to collect all available evidence. She was concerned that the OIC may not be treating her complaint seriously because stereotypes the OIC held about Myriam based on her cultural identity.

Myriam became so disillusioned with the conduct of the OIC that she requested a new OIC be appointed. This request was refused, and Myriam had to keep engaging with the OIC she had lost faith in. In subsequent communications with the OIC, Myriam directly voiced her frustrations at the OIC's approach and became increasingly hostile in her responses.

Myriam was then notified that the OIC had applied for an Apprehended Personal Violence Order (*APVO*) against her. Myriam had not had any contact with the OIC that was outside of their communications in relation to the investigation of her complaint. She had not made any threats against the OIC, nor did

[34] In relation to s 583(6)(c), the report stated: '*Refer to first statutory review report, to be tabled by 2 December 2026. … the review must consider the transcripts of criminal trials. In doing so, the review will consider how the reviewable provisions are being applied, which may indicate effectiveness of training of criminal justice professionals*.' Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021: Statutory report on training pursuant to Crimes Act 1900 section 583(6) (Department of Communities and Justice, Dec 2024), 7.

they have any cause to have contact with one another beyond the sexual assault investigation.

The perpetrator was ultimately not charged in relation to the sexual assault against Myriam. Myriam herself was left to respond to proceedings against her by police, which took almost a year to resolve. In dismissing the application for a final APVO, the magistrate noted that police had questioned Myriam in a way that did not accord with the legislated standard for consent. Although a final APVO was not granted, Myriam's trust in the justice system has been entirely lost.

* Myriam is a pseudonym.

29. Myriam's experiences are not unique. Whilst police seeking an APVO against her may be an uncommon step, many victim-survivors who contact us share similar frustrations with the handling of their police complaints. They continue to report questioning based on pre-reform understandings of consent, police discouragement from proceeding with their complaints, poor investigatory practices, and a lack of information about the progress of their complaint. Current oversight mechanisms are limited, with complaints to the Law Enforcement Conduct Commission (*LECC*) typically resulting in a referral back to the same police area command.
30. Strong oversight mechanisms are needed to drive accountability for implementing the reforms in practice. A key ALRC recommendation was that the Taskforce that is established to review recent police reports must also 'develop a model for an independent, ongoing review mechanism for all reports of sexual violence that the police do not progress to charge'.[35] The ALRC directed that this model should be in place within 24 months of the Taskforce's initial report. This will be a vital mechanism for ensuring that police apply correct understandings of consent and that there is greater consistency in practice across regions.
31. Because there is currently extremely limited scope for victim-survivors to have legal support through the criminal process, much of what our service knows about the implementation of the reforms is anecdotal. Post-reform, clients continue to report that police questioning practices do not reflect a communicative consent standard. Clients have described police questioning that remains focused on rape-myth based expectations such as force, resistance, injury, and immediate complaint, rather than querying whether and how the perpetrator sought consent.
32. We additionally note that Recommendation 26 of the ALRC was that the Standing Council of Attorneys-General should establish an appropriately funded national taskforce to develop a national quality assurance framework for police interviewing of complainants of sexual violence. We believe that this will be of great assistance in driving improvements in police practice and look forward to an update on the progress of this work.

Recommendation 8

That, to assess police implementation of the reforms, the ALRC-recommended independent review of police sexual assault reports is urgently progressed. The Taskforce that conducts the review should then establish an ongoing independent review mechanism for police reports that do not progress.

33. Another problem clients encounter is the lack of transparency surrounding decisions by the ODPP. Even in cases where police wish to proceed, the ODPP may decline to prosecute. This can be highly distressing and confusing for victim-survivors. In our experience, it can be challenging for clients to obtain clear answers from ODPP about why they will not proceed.

[35] ALRC Recommendation 4.

34. In response to a recommendation of the Royal Commission into Institutional Responses to Child Abuse, the ODPP implemented a *Victims' Right of Review Policy*. This policy entitles victims to a reassessment (by the same office that made the decision) and 'a full explanation for the decision' not to prosecute. However, in practice, the reasons that victim-survivors are given may be limited to relatively general comments regarding evidential sufficiency thresholds. Because victim-survivors cannot access a copy of their file,[36] and there is no external oversight mechanism, they have no further ability to understand the decision. It is therefore unclear to us whether prosecutorial decision-making is being driven by current understandings of consent.

35. The ALRC recommendations include the annual reporting of data on sexual violence cases that are discontinued by ODPPs, including the reasons for discontinuance.[37] They also include establishing and funding an independent centralised feedback mechanism for complainants to report their experience of the criminal justice system, to be managed by the Victims of Crime Commissioner.[38] Prompt action on these recommendations is needed to provide a measure of oversight of whether the reforms are impacting ODPP decision making. The independent feedback mechanism for complainants will also be a source of wide-ranging information for future statutory reviews.

Recommendation 9

That, to monitor the ongoing implementation of the reforms, annual data is publicly reported on sexual violence cases that are discontinued by ODPP, including the reasons for discontinuance. The report containing this data should be promptly published, within three months of the end of the reporting year.

Recommendation 10

That, to monitor implementation of the reforms and provide data for future reviews, the ALRC-recommended independent feedback mechanism is established. This mechanism is to be managed by the incoming independent Victims of Crime Commissioner and must be adequately funded.

36. For the purposes of the present review, the NSWLRC made clear that reviews must consider the experiences of complainants and we do not consider that the present consultation process (via a general call for written submissions) adequately achieves this. Instead, proactive efforts are needed to provide trauma-informed and accessible ways for victim-survivors to engage with the review. Until the independent feedback mechanism is established, we suggest that an independent interview-based study (such as that which BOCSAR commissioned in 2023)[39] would be a suitable approach.

[36] Per Schedule 2 of the *Government Information (Public Access) Act 2009*, information relating to the prosecuting functions of the ODPP is excluded from access.

[37] ALRC Recommendation 5.

[38] ALRC Recommendation 6.

[39] Elena Campbell, Danielle Woolley and Frances Lockie, *'This Is My Story. It's Your Case, but It's My Story.' Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (NSW Bureau of Crime Statistics and Research, 31 July 2023).

Recommendation 11

That the review process incorporates meaningful consultation with victim-survivors who have engaged with the criminal process post-reform.

The requirement to report on the efficacy of training (s 583(6)(c))

37. As noted above, there is a statutory obligation to table a report on how effective agency training on communicative consent has been.[40] A report was tabled in December 2024 but did not include the required evaluation of the effectiveness of training. Nor did the report confirm whether the training that was provided addressed the topics recommended by the NSWLRC.[41] The report indicated that the requirement to report on training effectiveness would be addressed in the statutory review, via the assessment of trial transcripts.[42] We look forward to seeing this analysis, but reiterate that an assessment of the efficacy of training of police is also required.

Recommendation 12

That the review provides a thorough evaluation of whether and how training has impacted upon trial practice.

Recommendation 13

That the review also provides an independent evaluation of how training has impacted police practice.

38. We also wish to make recommendations for the training to be provided throughout the next review period. At this stage of the reform process, when agencies have already received education on the contents of the reforms, training must shift towards strategies for implementing them in practice. Without this, police officers, judges and legal practitioners are likely to continue to conduct cases in accordance with long-established (but no longer sound) practice.
39. Studies of sexual assault trials consistently observe that uptake of progressive reforms can be limited in practice. Past NSW transcript studies have observed that, for example:
    i. the reformulation of consent as 'free and voluntary agreement' was rarely operative;[43]
    ii. both the Crown and defence case were typically framed in terms of their alignment (or misalignment) with rape myths, despite 'myth-busting' reforms;[44]

[40] *Crimes Act 1900* (n 21) s 583(6)(c).

[41] New South Wales Law Reform Commission (n 2) [10.33].

[42] In relation to s 583(6)(c), the report stated: '*Refer to first statutory review report, to be tabled by 2 December 2026. … the review must consider the transcripts of criminal trials. In doing so, the review will consider how the reviewable provisions are being applied, which may indicate effectiveness of training of criminal justice professionals*.' Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021: Statutory report on training pursuant to Crimes Act 1900 section 583(6) (Department of Communities and Justice, Dec 2024), 7.

[43] Quilter and McNamara (n 4) 15.

[44] Ibid 38; Croskery-Hewitt (n 4) 218.

iii. the relevance and admissibility of evidence that is raised to engage rape myths was seldom challenged;[45]

iv. the Crown seldom utilised provisions concerning intoxication and non-consent;[46]

v. long-embedded jury directions to address misconceptions (such as the mandatory 'delay' direction) were frequently not utilised;[47] and

vi. despite statutory restrictions, sexual experience evidence was frequently admitted.[48]

40. These transcript studies have identified that that the practice of Crown counsel, and the way the Crown frames their case, is central to the effectiveness of sexual violence reforms.[49] They have highlighted that prosecutors may not be utilising the available legislative tools to curtail rape-myth based arguments, and that the way the Crown case is being put may not reflect the legislated definition of consent. Rape myth engagement can be subtle, and it can be so ingrained into trial practice that it goes unquestioned. We therefore urge that practical training and resources are needed to support prosecutors to develop new approaches.

41. Assisting prosecutors to formulate new approaches was a specific recommendation of the 2023 BOCSAR-funded transcript study,[50] and also aligns with the ALRC's recommendations for training on rape myths that is tailored to the specific tasks required of prosecutors.[51] As the ALRC emphasised, any training and resources should be developed with input from experts (including the domestic, family and sexual violence sector) and should inform the organisation's guidelines.[52] We note that other jurisdictions have developed resources that may be of interest when designing NSW guidance; for example, from the United Kingdom: *Responding to the challenge of rape myths in court: A guide for prosecutors*;[53] and the Crown Prosecution Service's guides *Tackling Rape Myths and Stereotypes*[54] and *Toolkit for Addressing Consent.*[55]

Recommendation 14

That, during the next review period, ODPP training focuses on practical strategies and resources for embedding the communicative model of consent and the resistance of rape-myths into trial practice. The training and resources should be developed with the input of experts and tailored to the specific tasks required of prosecutors.

42. Of course, judicial control of proceedings plays a vital role in the implementation of progressive reforms. During the next review period, judicial training should also focus on the practical implementation of the reforms. This should include, for example: identifying subtle rape myth-engagement and the need for a corrective jury direction; best practice in the timing and delivery of jury directions (including integrating the facts of the matter into directions); effectively

[45] Department for Women (NSW) (n 12) 180; Quilter and McNamara (n 4) 39.

[46] Croskery-Hewitt (n 4) 141.

[47] Department for Women (NSW) (n 12) 9.

[48] Ibid 10; Quilter and McNamara (n 4) 12.

[49] Croskery-Hewitt (n 4) 266; Quilter and McNamara (n 4) 38.

[50] Quilter and McNamara (n 4) 38–9.

[51] ALRC Recommendation 13.

[52] ALRC Recommendation 11.

[53] Nina Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (NB Research, 2013).

[54] Crown Prosecution Service (UK), 'Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes' <https://www.cps.gov.uk/prosecution-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes>.

[55] Crown Prosecution Service (UK), *Tool Kit for Addressing Consent and Associated Myths for Prosecuting Advocates in Rape Trials* <https://www.cps.gov.uk/sites/default/files/documents/publications/Tool-kit-for-advocates-consent.pdf>.

embodying the communicative consent standard throughout directions; and scrutinising the relevance and admissibility of evidence that is being raised to engage a rape myth or outdated understanding of consent.[56]

43. Again, there are several resources from other jurisdictions that may be of interest in developing judicial guidance. For example, New Zealand judges are provided with extensive training on managing sexual violence trials by Te Kura Kaiwhakawā/The Institute of Judicial Studies, which also published the guide *Responding to Misconceptions About Sexual Offending: Example Directions for Judges and Lawyers*.[57]

Recommendation 15

That, during the next review period, judicial training focuses on practical strategies and resources for embedding the communicative model of consent and the resistance of rape-myths into trial practice. The training and resources should be developed with the input of experts and tailored to the specific tasks required of judges.

IMPROVING THE EFFICACY OF THE REFORMS

44. The success of the reforms in achieving their intended effect will be heavily influenced by the outcomes of other current reform recommendations; in particular, the provision of legal support to victim-survivors throughout the criminal process and the implementation of ground rules hearings. If framed appropriately, these measures could be highly effective in curtailing rape myth-based responses to sexual assault.

Independent legal support for complainants

45. In our view, the single most impactful measure to drive accountability for implementation of the reforms would be actioning the ALRC's recommendations in relation to specialist legal support for victim-survivors. Without access to legal assistance, victim-survivors may struggle to identify and query decisions by police and ODPP that are based upon outdated understandings, to utilise the available review and complaint mechanisms, and to ensure that their rights and dignity are upheld throughout the criminal process.

46. The ALRC recommended that the Commonwealth and state governments fund a coordinated network of 'existing, trusted services, such as Women's Legal Services', to provide legal advice and targeted representation to victim-survivors throughout the criminal justice process.[58] The ALRC specifically noted the importance of Women's Legal Services in providing sexual assault legal services in states where they have already been piloted, and noted that capacity building for Women's Legal Services and Aboriginal and Torres Strait Islander Women's Legal Services is a priority under the *National Plan to End Violence against Women and Children*.

47. We note that the federal government committed $19.6 million over three years for the establishment of sexual assault legal services in all states and territories. Unlike other states and territories, NSW is yet to tender for the delivery of these services. It has now been nine months

[56] Pursuant to ss 55-56 of the *Evidence Act 1995*.

[57] *Responding to Misconceptions About Sexual Offending: Example Directions for Judges and Lawyers* (Te Kura Kaiwhakawā/Institute of Judicial Studies, July 2024) <https://www.courtsofnz.govt.nz/assets/Uploads/Addressing-misconceptions-version-July-2024.pdf>.

[58] ALRC Recommendations 1 & 9, see also [3.84].

since the federal government committed this funding, and we are concerned that the NGO and community legal sectors in NSW have not yet been consulted with about the establishment of these services.

48. Independent legal support for victim-survivors is vital to ensure accountability for implementation of the reforms and, more broadly, to increase victim-survivor engagement with the criminal process. As the ALRC recognised, to be effective, these legal services must be provided by organisations with a deep understanding of the dynamics of gender-based violence and a trauma-informed and culturally safe approach to legal practice.[59]

Recommendation 16

That, to drive accountability for the implementation of the reforms, the NSW Government urgently actions the ALRC's recommendation to fund Women's Legal Services and other trusted organisations to provide independent legal advice and targeted representation to all victim-survivors.

Ground rules hearings

49. A key recommendation of the 2023 BOCSAR-commissioned transcript study,[60] which was also a recommendation of the ALRC,[61] was the extension of ground rules hearings to all sexual offence trials. Ground rules hearings provide a much-needed opportunity for agreements to be reached about the nature and scope of cross-examination, for identification of admissibility issues, and for early consideration of appropriate jury directions.

50. As well as minimising complainant distress, robust ground rules hearings are an important means of pre-emptively curtailing irrelevant questioning and rape myth reliance, planning for optimal use of jury directions, and limiting delays. This has the potential to greatly aid the implementation of the reforms. Of course, the efficacy of ground rules hearings in supporting the reforms will depend heavily upon how they are implemented. We urge that the most important mechanism for ensuring that ground rules hearings are impactful is giving the complainant standing to be heard.

51. As existing research has identified, the Crown may be disincentivised from making use of progressive reforms for a variety of reasons.[62] Judges can also face disincentives to enforcing legislative protections, from a reluctance to abandon long-embedded practices, to the prospect of appeals. Giving standing to an independent representative would ensure that there is someone in the courtroom whose sole priority is upholding the rights and dignity of the complainant. This person would not be prevented by competing concerns from intervening to prevent inappropriate or inadmissible lines of questioning.

52. In Victoria, where ground rules hearings are mandated for all sexual offence trials, the Victims of Crime Commissioner has emphasised the need for complainant representation. The Commissioner has proposed that, at a ground rules hearing, the independent representative could:

    i. assist the court in determining the manner and content of questioning;

[59] Australian Law Reform Commission (n 3) [6.91].

[60] Quilter and McNamara (n 4) 40.

[61] ALRC Recommendation 32.

[62] Quilter and McNamara (n 4) 38.

ii. ensure cross-examination and the structure of questioning will not cause undue trauma; and

iii. assist a complainant to better prepare for giving evidence and understand the type of questioning.[63]

53. The Commissioner has further recommended that the independent representative is present throughout cross-examination in order to:

i. ensure that questioning complies with the directions made at a ground rules hearings;

ii. assist the court in ensuring compliance with evidentiary protections (i.e. that the victim is not asked improper questions); and

iii. ensuring that sexual history evidence laws are complied with.[64]

54. In making these recommendations, the Commissioner emphasised that this would not prejudice the adversarial nature of the trial. The representative would have a purely protective role, and the complainant would remain a participant and not a party to the proceedings.

Recommendation 17

That ground rules hearings are mandated for all sexual offence trials, to aid in the prevention of myth-based lines of questioning and the identification of appropriate jury directions.

Recommendation 18

That complainants are entitled to have independent representation at ground rules hearings and during cross-examination, for the purpose of ensuring that directions made at ground rules hearings are upheld.

FURTHER PROPOSED REFORMS

55. The Discussion Paper seeks feedback on several potential further reforms. It is our perspective that ensuring the effective operation of the existing provisions is of higher priority than enacting further legislative changes.

56. However, one proposal that we see great merit in is the provision of additional jury directions in relation to flirtation and post-offence relationships. In our experience, these specific rape-myths are pervasive and create significant impediments to the successful prosecution of sexual assault. We stress that, to be effective, these directions must be required to be given at the time the relevant rape-myth is engaged, and each time it is engaged.

57. Jury directions are, of course, not a bar on misconception-based lines of questioning. Existing research has found that the prospect of a mandatory 'delay in complaint' direction has not deterred defence counsel from pursuing cross-examination on this topic as a matter of course.[65]

[63] *Sidelined and Silenced: Systemic Inquiry into Victim Participation in the Justice System* (Victorian Victims of Crime Commissioner, November 2023) 382–3.

[64] Ibid 384.

[65] Quilter and McNamara (n 4) 21.

The impact of directions upon juror decision-making may also be variable.[66] To be effective, misconception-related directions '*must* be given if raised by the evidence, *at the time* the evidence is raised ("as soon as is practicable"), and with or without a request from the Crown or submissions from counsel', and integrated directions should be promoted as best practice.[67]

Post-event relationships direction

58. A direction on post-event relationships would be a particularly useful tool to improve the legal response to intimate partner sexual violence (*IPSV*). As discussed above, IPSV is severely under recognised and victim-survivors of IPSV face an additional suite of rape-myths and barriers to justice. The myth that 'real victims' of domestic violence would try to separate from the perpetrator remains highly influential.

59. To effectively respond to IPSV, we recommend that the direction includes specific reference to circumstances of intimate partner violence. We note that McDonald's recent analysis of IPSV trials in New Zealand found there was '*a clear and pressing need for the provision of [a direction] about the impact of social entrapment and coercive control*.'[68] McDonald also highlighted directions on family violence in Western Australia that would be useful in an IPSV context, such as:

> *experience shows that it is not uncommon for a person who has been subjected to family violence to stay with an abusive partner … or to leave and then return to the partner;*
>
> *experience shows that it is not uncommon for a person who has been subjected to family violence not to report family violence to police or seek assistance to stop family violence*; *and*
>
> *decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by a variety of factors.*

60. Of course, appropriate jury directions are only a small part of what is needed to better respond to IPSV. As discussed at [14]-[15], the way that counsel and judges are framing the impacts of coercive control upon consent requires close analysis in this statutory review. We also urge action on the ALRC's recommendations regarding expert evidence (Recommendations 23-25), which would more readily enable the provision of 'counter-intuitive' evidence concerning IPSV.

Recommendation 19

That a direction is introduced to address post-event contact between the complainant and accused, and that this direction explicitly addresses key misconceptions concerning intimate partner sexual violence.

'Flirtation' direction

61. Recent analyses of NSW trial transcripts have confirmed that scrutiny of 'flirtatious' behaviour is ubiquitous in the courtroom, particularly for complainants who had consumed alcohol or

[66] See, eg, Claire Baylis, 'Shaping Juror Narratives In Sexual Violence Cases: The Influence Of Rape Myths And Misconceptions' (PhD Thesis, Te Herenga Waka—Victoria University of Wellington, 2025) 87.

[67] Quilter and McNamara (n 4) 40.

[68] McDonald, *Prosecuting Intimate Partner Rape: The Impact of Misconceptions on Complainant Experience and Trial Process* (n 5) 455.

drugs.[69] A specific jury direction is an important tool to respond to this. But again, on its own, a direction may have insufficient impact upon this practice, as it will not *prohibit* questions that imply that flirtation indicates sexual consent.

62. Commentators have raised the need for closer scrutiny of the relevance and admissibility of 'flirtation' evidence. Given that consent must be given at the time sexual activity occurs, and to each specific sexual act, the probative value of flirtation evidence warrants careful consideration. One means of achieving this would be clarifying the parameters of 'sexual experience' evidence.[70]
63. A review of New Zealand trials found reliance on 'flirtation' to be similarly ubiquitous and concluded that '*subjecting this type of evidence only to the requirements of relevance and sufficient probative value is not resulting in a robust analysis of appropriate purpose, use and admissibility*'.[71] It was therefore recommended to clarify that 'sexual experience' includes '*all forms of intimate interaction … such as kissing, cuddling, flirting et cetera*'.[72] It was further recommended that sexual experience restrictions should encompass sexual behaviour with the particular defendant, so that these interactions were also subjected to appropriate scrutiny. (Indeed, some jurisdictions refer to 'sexual behaviour' rather than 'sexual experience' or 'sexual history'[73]).
64. The transcript study being undertaken for this statutory review provides a vital opportunity to assess whether the affirmative consent standard has lessened reliance upon 'flirtation' evidence. From this, consideration should be given to the need to clarify the parameters of sexual experience restrictions in NSW.

Recommendation 20

That a direction is introduced to address 'flirtatious' behaviour by the complainant.

Recommendation 21

That sexual experience evidence restrictions are clarified so as to explicitly capture 'flirtation' evidence.

Other proposed amendments

65. We briefly indicate our position on the remaining proposals as follows:
    i. Whether the list of people who may experience non-consensual sexual activity in s 292A of the *Criminal Procedure Act* should specifically include sex workers:
        - We support the availability of a specific direction that sex workers can be sexually assaulted, as in Victoria. We reiterate that, for jury directions to be impactful, they must be utilised effectively by judges and given at the time a rape-myth is engaged.
    ii. Whether gendered language should be removed from the definition of 'sexual intercourse':

[69] Quilter and McNamara's analysis of 75 NSW transcripts observed scrutiny of 'flirtatious' behaviour in 56% of trials: Quilter and McNamara (n 4) 20. Croskery-Hewitt's analysis of 30 intoxication-involved trials observed scrutiny of 'flirtatious' behaviour in 83% of trials: Croskery-Hewitt (n 4) 158.

[70] *Criminal Procedure Act 1986* (n 22) s 294CB.

[71] McDonald et al (n 1).

[72] Ibid 149.

[73] See, for example, s 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK).

- We have no particular view on the proposed amendment.

iii. Whether stealthing should be a standalone circumstance in which there is no consent:

- Without transcript data, we cannot comment on the extent to which the current drafting (which lists stealthing as an 'example' of where no consent is given, but not a separate provision) is failing to capture incidents of stealthing. However, we generally support consistency with the drafting approach taken in other jurisdictions, whereby stealthing is a standalone provision.

iv. Whether 'warning' should be replaced with 'direction' in provisions of the *Criminal Procedure Act*:

- We do not have a particular position on this proposal, but support consistency of language throughout the Act.

Recommendation 22

We support:

- Introducing a jury direction that sex workers can be sexually assaulted.
- Addressing 'stealthing' in a standalone provision.
- Replacing 'warning' with 'direction' in relevant provisions of the *Criminal Procedure Act*.

Sexual experience evidence

66. This review is required to consider s 294CB of the *Criminal Procedure Act 1986* and determine whether its terms remain appropriate.[74] We note that the Discussion Paper specifically invited submissions on the the relationship between section 294CB and the communicative consent standard (s 61HJ(1)(a) of the *Crimes Act 1900*). Given that the results of the transcript study are not yet available, we are unable to comment on the extent to which the communicative consent standard has increased reliance on sexual experience evidence. We urge that the transcript study should specifically consider this question. If the transcript study finds that sexual experience evidence continues to be readily admitted, we suggest that the broad exception in s 294CB for evidence of prior sexual contact between the complainant and accused may require attention.[75] Pursuant to this exception, evidence of prior sexual activity between the complainant and accused may be admitted provided that '*the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer*'. Past research indicates that such evidence is readily admitted, suggesting that probative value may be receiving inadequate scrutiny.
67. This exception provides a powerful tool to circumvent the proper application of the communicative consent standard. Evidence of prior sexual contact between the complainant and accused is prone to being misused to infer the complainant likely consented to the charged sexual activity. This reasoning directly undermines the need for communicative consent to be provided for each specific sexual encounter and act. It is particularly problematic in cases

[74] *Criminal Procedure Act 1986* (n 22) s 368(6)(b).

[75] Section 294CB does not apply to evidence relating to a relationship between the complainant and the accused (where the relationship was existing or recent at the time of the alleged offence). Notably, case law has even found that sexual activity with a third party can constitute evidence relating to a relationship between the complainant and the accused: *Cook v The King* [2024] HCA 26.

involving intimate partner sexual violence, where the complainant and accused may have a lengthy sexual history.

68. Other jurisdictions apply a higher threshold for the admission of such evidence, which may warrant consideration. For example, that:

    - the evidence is '*of such direct relevance to facts in issue … that it would be contrary to the interests of justice to exclude it*' (*Evidence Act 2006* (NZ), s 44(a));
    - the evidence is of '*substantial relevance to a fact in issue* ***and*** *it is in the interests of justice to allow the cross-examination or to admit the evidence*', having regard to factors including '*the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility*' and '*the need to respect the complainant's personal dignity and privacy*' (*Criminal Procedure Act 2009* (Vic), s 349));
    - '*a refusal of leave might have the result of rendering unsafe a conclusion of the jury or the court*' (*Youth Justice and Criminal Evidence Act 1999* (UK), s 41(2)).

Recommendation 23

That the transcript study addresses the interaction between section 294CB of the *Criminal Procedure Act 1986* and section 61HJ(1)(a) of the *Crimes Act 1900*.

69. We consider that it is appropriate to retain the existing bar on evidence of the complainant's sexual experience with persons other than the accused (rather than the 'discretionary leave' approach recommended by the ALRC). As the Discussion Paper notes, the recent BOCSAR-commissioned trial study observed sexual experience evidence being raised in at least half of the examined trials and did not find evidence indicating that section 294CB is too restrictive.[76] In our view, the admission of evidence of a complainant's sexual experience with third parties poses an inevitable and unacceptable risk of engaging rape-myth based reasoning, and cannot serve any legitimate purpose.

Recommendation 24

That the bar on the admission of evidence of the complainant's sexual experience is retained.

70. However, we consider that one key amendment is required to the existing statutory bar. We prefer the position taken in s 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK), whereby sexual experience restrictions apply specifically to *defence* efforts to scrutinise the complainant's sexual history. Similar to the NSW position, the UK provision provides a bar on the admission of evidence of the complainant's 'sexual behaviour', subject to narrow statutory 'gateways'. Unlike NSW, this bar applies specifically to evidence that is adduced and questions that are asked 'by or on behalf of any *accused*'.

71. The purposes of the introduction of sexual experience evidence restrictions in NSW in 1981 were to 'ease, so far as is possible, the humiliation experienced by sexual assault victims, to remove the stigma attached to the rape victim, to encourage victims to report the offences, and to bring the offenders to justice as justice demands'.[77] These purposes are not aided by preventing *complainants* from speaking to the context of their experiences. Indeed, one of the recent NSW

[76] Quilter and McNamara (n 4) 12.

[77] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 1981 at 4759-4760.

transcript studies observed instances of defence counsel utilising s 293 (now numbered s 294CB) to resist complainants' efforts to explain the context of their non-consent (for example, a defence objection to a complainant explaining that she was a lesbian, so did not have sex with men).[78]

72. We consider that this shift is especially vital in light of the efforts of the reforms to address non-consent in the context of a pattern of coercion or intimidation. Particularly in cases involving intimate partner sexual violence, the assessment of consent may require evidence to be elicited from the complainant of patterns of sexually coercive behaviour. It is important that s 294CB does not provide impediments to the complainant providing this essential evidence. Indeed, post-reform case law has noted the tension between s 294CB and the new provision on non-consent in the context of a pattern of coercion or intimidation.[79]

Recommendation 25

That s 294CB is amended to specifically restrict evidence being adduced, or questions being asked in cross-examination, by or on behalf of *the accused*.

73. Given that the use of sexual experience evidence can be highly sensitive and distressing from a complainant's perspective, it is vital that complainants have an opportunity to have their views heard before a decision to admit such evidence is made. We urge that independent legal representation for complainants is vital when determining admissibility issues under s 294CB. Even in cases where the evidence is ultimately admitted, representation during admissibility decisions would aid with closely scrutinising the scope and manner of questioning, to minimise the complainant's humiliation and distress as far as possible.

74. The need for independent representation to assist complainants in protecting their sensitive counselling communications has been recognised for some time. The same concerns apply to the admission of sexual experience evidence and representation is required. We further note that there are models of this mode of independent representation in other jurisdictions,[80] and that, domestically, it has been recommended by the Victorian Victims of Crime Commissioner.[81]

Recommendation 26

That complainants are given standing to appear, and access to independent legal representation, if evidence is sought to be adduced concerning their sexual experience.

Inconsistencies with the Crimes (Administration of Sentences) Act *require attention*

75. The 2021 reforms sought to strengthen the requirements for valid consent, including by better recognising the impacts of patterns of coercion, intimidation, and the abuse of 'a relationship of authority, trust or dependence'.[82] The *Crimes Act* now makes clear that participation in sexual activity due to coercion or the abuse of such a relationship is not consensual.

[78] Croskery-Hewitt (n 4).

[79] *R v Khoshdil* [2024] NSWDC 257 [37]-[40].

[80] See, for example, *Sex Offenders Act 2001* (Ireland), s 34.

[81] *Sidelined and Silenced: Systemic Inquiry into Victim Participation in the Justice System* (n 63) Recommendation 22.

[82] *Crimes Act 1900* (n 21) s 61HJ.

76. This effort to recognise the severity of such sexual abuse stands in stark contrast to s 236Q of the *Crimes (Administration of Sentences) Act 1999*. Section 236Q sets out the 'misconduct offence' of a a correctional employee engaging in sexual conduct with an inmate. This offence has a maximum penalty of just 2 years' imprisonment. Given that it does not require evidence of non-consent, it may be favoured by prosecutors as a more straightforward charge than sexual assault, leading to a minimisation of the harm suffered by women in custody who are sexually abused by correctional officers.

77. The power differential between an inmate and a correctional officer renders free and voluntary consent impossible. This was clearly highlighted in the recent *Breaking Silence* report on staff-perpetrated sexual violence in custody.[83] A far stronger deterrent is required, in order to align with the current *Crimes Act* approach to consent and effectively tackle this pervasive issue.

Recommendation 27

That the penalty for offences under s 236Q of the *Crimes (Administration of Sentences) Act 1999* is significantly increased, to align with current understandings of consent.

[83] Survivor Leadership Group, Kelly Austin and Phillipa Evans, *Breaking Silence - 'In Search of Safety': Solutions from Survivors of Staff-Perpetrated Sexual Violence in Custody* (UNSW, 2025).